No. 03-641

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

REGAL CINEMAS, INC. and EASTGATE THEATRE, INC.,

Petitioners,

v.

KATHY STEWMON, TINA SMITH, and KATHY BRADDY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF HOYTS CINEMAS CORPORATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Pursuant to Rule 37.2 of the rules of this Court, Hoyts Cinemas Corporation ("Hoyts") submits this brief as *amicus curiae* in support of petitioners Regal Cinemas, Inc. and Eastgate Theater, Inc.'s Petition for a Writ of *Certiorari*. This brief seeks to bring to the Court's attention Hoyts' interactions with the Department of Justice ("DOJ") that are directly relevant to the questions presented by petitioner and which have not been fully developed by the parties to this appeal. Both Petitioner and Respondent have consented for Hoyts to file this *amicus* brief.[2]

Hoyts is currently a defendant in litigations in two Circuits involving the same issues that Regal Cinemas, Inc. ("Regal") raises in its Petition for *Certiorari* to this Court. Hoyts was sued by the DOJ in the District of Massachusetts, in *United States of America v. Hoyts Cinemas Corporation and National Amusements, Inc.*, Civil Action No. 00-12567-WGY ("*U.S. v. Hoyts*"), as well as by private plaintiffs, Susan

1. This brief was not authored in whole or in part by counsel for a party to this proceeding. Hoyts was acquired by Regal Entertainment Group, the parent company of petitioner Regal, in a stock purchase transaction on March 27, 2003, years after almost all the events discussed in this brief occurred. Thereafter, the stock of Hoyts was acquired by Regal itself and Hoyts currently operates as a wholly-owned subsidiary of Regal. Since April 2003, Regal Entertainment Group, the parent company of both Regal and Hoyts, has paid Hoyts' legal fees in the action of *U.S. v. Hoyts*, including the fees expended for the preparation and submission of this brief. Hoyts is represented in the *U.S. v. Hoyts* and *Meineker* actions by separate counsel from petitioner.

2. Copies of both letters from the parties consenting to the filing of this brief have been filed separately with the Court.

Meineker and Sybil McPherson, in the Northern District of New York, in *Susan Meineker and Sybil McPherson v. Hoyts Cinemas Corporation*, Civil Action No. 98-CIV-1526 (DNH/DRH) ("*Meineker*").[3]

At the heart of both actions is the question whether the DOJ's latest interpretation of Section 4.33.3 of the ADAAG should be granted judicial deference, as it was in *Kathy Stewmon, et al. v. Regal Cinemas, Inc.* ("*Stewmon*"), 339 F.3d 1126 (9th Cir. 2003). Hoyts has first-hand experience with the DOJ's constantly-changing interpretations of Section 4.33.3. Over the years, various DOJ representatives have given Hoyts several contrary interpretations of Section 4.33.3, first in direct communications in the mid-1990's between Hoyts and the DOJ's technical assistance ADA "Helpline," and later, in the course of the DOJ's presentation of its case in *U.S. v. Hoyts*. Hoyts' experience with the DOJ's evolving interpretations of Section 4.33.3 bears directly on the question whether deference should be accorded to the DOJ's current interpretation of the regulation, which was adopted by the majority in *Stewmon*.

As a defendant in *U.S. v. Hoyts* and *Meineker*, Hoyts faces a very direct threat of drastic financial liabilities if the DOJ succeeds in its attempt to obtain court orders in those cases that require Hoyts to reconstruct hundreds of its movie theaters. The decision of the Ninth Circuit and of this Court is, therefore, of great importance to Hoyts.

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3. The DOJ has recently moved to intervene in the *Meineker* action to assert direct ADA claims against Hoyts.

SUMMARY OF ARGUMENT

Hoyts has direct (and endlessly frustrating) experience with the DOJ's continually-changing interpretations of Section 4.33.3. For years the DOJ has proclaimed that each of its interpretations of Section 4.33.3 is entitled to case-determinative deference, even though the DOJ has changed its interpretation of Section 4.33.3 so often that such conduct would never be tolerated from a private litigant.

For five years the DOJ has obdurately refused to use the notice and comment procedures of the Administrative Procedures Act ("APA") to revise Section 4.33.3. Instead, the DOJ has pursued a nationwide litigation crusade against movie-theater owners with the aim of compelling the entire industry to reconstruct, at breathtaking expense, thousands of movie theaters that were built years before the DOJ announced its new (and still evolving) views on the meaning of Section 4.33.3. The DOJ's conduct has produced a welter of conflicting judicial opinions on the meaning of Section 4.33.3, has evoked repeated criticism from federal judges, and has put the financial viability of Hoyts (as well as the entire movie theater industry) at risk.

The DOJ's approach to Section 4.33.3 is not reasonably based on the regulation's plain language. And it is driven by litigation strategy rather than sound policy. As a result, when courts like *Stewmon* defer to the DOJ's position, they only exacerbate the "impossible uncertainty" among architects, designers and theater owners as to what the law requires. *Stewmon*, 339 F.3d at 1133 (Kleinfeld, J., dissenting). Hoyts' experience with the DOJ's interpretation-of-the-month approach to Section 4.33.3 dramatizes how the DOJ is

abusing the *Auer* judicial deference doctrine[4] as a litigation weapon in the DOJ's war against the theater industry.

After the ADA was first promulgated, the DOJ issued regulations including Section 4.33.3 to carry out its mandates. Shortly after Section 4.33.3 was adopted, the government's own expert study advised the DOJ that there was substantial industry confusion about what Section 4.33.3 meant. The DOJ's response was prolonged silence; despite a statutory mandate to provide the public with technical assistance concerning ADA regulations, the DOJ issued no written advice or manuals whatever to explain how Section 4.33.3 applies to movie theaters. The only source of technical assistance available to Hoyts in those circumstances was a technical assistance "Helpline" set up by the DOJ to respond to questions about the application of the ADAAG. Hoyts contacted the Helpline in 1996, before Hoyts designed and built hundreds of multi-million dollar stadium-style theaters.

During those discussions, the DOJ gave direct guidance to Hoyts that Section 4.33.3 *permitted* Hoyts to place wheelchair seats in the flat, *front* section of Hoyts newly-designed, stadium-style theaters. Two years later, however, after 90% of Hoyts' stadium-style theaters were already built or under construction, the DOJ changed positions. In July 1998 the DOJ announced in an *amicus* brief filed in the *Lara* district court that Section 4.33.3 in fact required the placement of wheelchair seats in a certain part of the stadium section of such theaters that the DOJ deemed "desirable."

In December 2000 the DOJ sued Hoyts in *U.S. v. Hoyts*, alleging that *all* Hoyts stadium-style theaters violated Section

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4. *Auer v. Robbins*, 519 U.S. 452 (1997).

4.33.3 under the DOJ's new views of the regulation. During the *U.S. v. Hoyts* litigation, the DOJ changed its interpretation of Section 4.33.3 *at least four times*. The latest interpretation, presented just 60 days ago in the DOJ's First Circuit brief, is the same one that the DOJ advanced in the Ninth Circuit in *Stewmon* and to which the Ninth Circuit granted deference in August 2003.

The Ninth Circuit was wrong to defer to the DOJ's newest interpretation of the regulation. An agency's interpretation of its own regulation is not entitled to deference when that interpretation is merely a "convenient litigation position," especially one that continues to shift repeatedly throughout the litigation. Given the DOJ's shifting interpretations of Section 4.33.3, the DOJ's latest interpretation is plainly neither "fair" nor "considered"; rather, it is merely a post-hoc rationalization asserted to advance the DOJ's litigation position. *Certiorari* in this case should be granted because the *Stewmon* decision, by erroneously granting deference to the DOJ's latest interpretation of Section 4.33.3, undermines not only the established notice and comment procedures that are central to the APA, but also the even more fundamental due process requirement that all persons are entitled to reasonable notice of what the law demands.[5]

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5. Hoyts supports petitioner's other arguments for *certiorari* as well, but focuses on the issues in the text because of the significant additional perspective Hoyts believes it can contribute with respect to them.

ARGUMENT

I. The DOJ's Current Interpretation Of Section 4.33.3 Is Not Entitled To Deference Because It Is Only The Latest Of Many Shifting Interpretations Asserted By The DOJ To Support Its Litigation Position

Courts give deference to an agency's interpretation of its own regulation if there is no reason to doubt that the interpretation is the agency's fair and considered judgment on the matter. *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). But where the agency's interpretation is merely a "convenient litigation position," rather than the product of an agency's "fair and considered judgment," that position will not be afforded deference by the court. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988). Where an agency's position is inconsistent with the view advocated by the agency in past cases, it is not a fair and considered judgment. *Id.* at 212-13. And where the agency's interpretation has flip-flopped repeatedly throughout a single litigation it certainly is not entitled to deference. *Callaway v. Comm'r of Internal Revenue*, 231 F.3d 106, 132-33 (2d Cir. 2000). The DOJ's current interpretation of Section 4.33.3 is not entitled to deference because it is only the latest of a series of shifting positions tailored to suit the DOJ's litigation strategy in *U.S. v. Hoyts* and other cases.

A. The DOJ's Varied Interpretations Of Section 4.33.3

After Congress created the ADA on July 26, 1990, it expressly directed the DOJ to issue regulations to help carry out its provisions. 42 U.S.C. § 12186(b) (1990). The DOJ adopted such regulations on July 26, 1991. They were initially written by another federal agency, the Architectural and Transportation Barriers Compliance Board (the "Access Board"), and were known as the ADA Accessibility Guidelines for the construction and design of Buildings and Facilities ("ADAAG"). The purpose of ADAAG was to provide public facility owners, like Hoyts and Regal, with detailed guidelines for the design of public facilities so that they would properly accommodate disabled patrons.

1. The Language of Section 4.33.3 of ADAAG and the Confusion it Caused in the Movie Theater Industry

Section 4.33.3 states the requirements for wheelchair seating in "assembly" areas. It provides in relevant part:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and *lines of sight comparable to those for members of the general public.*

28 C.F.R. pt. 36, app. A at § 4.33.3, as set forth in Regal Cinemas, Inc.'s Petition for a Writ of *Certiorari* Appendix ("Pet. App.") at 45a (emphasis added).

Shortly after Section 4.33.3 was promulgated, the government commissioned a 1994 expert study that advised the DOJ of widespread industry confusion over what Section 4.33.3 required:

> [T]he research uncovered a *notable amount of divergence and confusion* among facility mangers, architects and individuals with disabilities in their interpretations of a number of *key, if ambiguous terms in ADAAG*. These differences are suggestive of areas in which clarification, explication and education are needed. For example, the *meaning of comparable sightlines* seemed to *vary significantly, depending on who you talked to.* There also were differences about the meaning of integrated or integral setting. Situations such as the above *suggest the need for working operational definitions for presenting and discussion findings related to ambiguous concepts.*

"Accessibility in Assembly Areas, Technical Report, Recommendations and Task Summaries," prepared for the Access Board, by the Center for Accessible Housing, reprinted in the Appendix to this Submission ("App.") at 2a (emphasis added).

In response to this industry confusion, the National Association of Theater Owners ("NATO") sought the government's interpretative guidance on the meaning of Section 4.33.3 through informal letters and, eventually, a formal rulemaking petition. In one letter, NATO stated that since the passage of the Americans with Disabilities Act in July 1990, there has been significant confusion with regard

to the ADA requirements for wheelchair seating in motion picture theaters. When the DOJ did not respond to that letter, NATO formally petitioned the DOJ for a rulemaking. The DOJ, however, refused to conduct a rulemaking proceeding until the Access Board amended ADAAG.

In addition to directing the DOJ to issue regulations to implement the ADA, Congress also required the DOJ to provide "appropriate technical assistance" to individuals or entities with rights or duties under this chapter." 42 U.S.C. § 12206(c)(3). Despite this statutory directive — and DOJ's knowledge since at least 1994 of the industry confusion over Section 4.33.3 — the DOJ at no time issued any written technical assistance pertaining to seating in movie theaters.[6] *See* deposition testimony of Ruth Lusher ("Lusher Dep."), dated May 29, 2002, at App. 4a. The DOJ did, however, set up a technical assistance telephone "Helpline" through which those governed by ADA regulations, including theater owners and operators, could obtain technical assistance on the meaning of Section 4.33.3 and the other provisions of ADAAG. *See* deposition testimony of Todd Anderson ("Anderson Dep."), dated February 8, 2002, App. at 13a; Lusher Dep., App. at 3a.

2. The DOJ's 1996 Helpline "Advice" to Hoyts About the Meaning of Section 4.33.3

When Hoyts first began designing and building stadium-style theaters in 1996, the only ADA-related resource available to Hoyts help interpret the meaning of Section 4.33.3 was the "Helpline" phone-in service provided by the

6. The DOJ and the Access Board did issue formal written technical assistance manuals in 1994. But the DOJ itself has stated that with respect to Section 4.33.3 these manuals addressed only sports arenas and other facilities where patrons are expected to stand, *i.e.*, not movie theaters.

DOJ for architects and other design professionals to obtain real-time architectural advice on how to comply with ADAAG. Lusher Dep. at 3a-4a. Hoyts' principal architect at that time was Arrowstreet, Inc. ("Arrowstreet"), which designed many of Hoyts' earliest stadium-style theaters. On behalf of Hoyts, Arrowstreet hired a code consultant firm, "Rolf Jensen Associates" ("RJA"), that provides guidance and technical advice about compliance with local and federal building-code regulations, including the ADA. *See* deposition testimony of Robert Carasitti, dated February 15, 2002 ("Carasitti Dep."), App. at 5a-6a.

In 1996, while working on the design of Hoyts Brassmill Connecticut theater complex, RJA's code consultant, Robert Carasitti, telephoned the "Helpline" to seek advice on where Section 4.33.3 required wheelchair seats to be placed in stadium-style theaters. Carasitti Dep., App. at 6a-7a. Mr. Carasitti's call was referred to Todd Anderson, a licensed architect employed by the DOJ whose duties including handling complex technical questions relating to ADA building requirements. Carasitti Dep., App. at 8a; Anderson Dep., App. at 13a-14a. Anderson told Carasitti that if Hoyts situated its wheelchair seats in the flat, *front section* of its proposed stadium-style theaters, those theaters would comply with Section 4.33.3. Carasitti Dep., App. at 10a; Anderson Dep., App. at 16a. Anderson testified that the advice he gave Carasitti was "consistent" with the advice about Section 4.33.3 that he was providing to the public generally at the time. Anderson Dep., App. at 16a. Mr. Carasitti relied upon his discussion with Anderson in advising Arrowstreet that their stadium theater designs for Hoyts complied with Section 4.33.3. Carasitti Dep., App. at 11a.

3. The DOJ's 1998 Litigation Interpretation of Section 4.33.3 in *Lara v. Cinemark*

Two years later, in July 1998, the DOJ commenced its litigation crusade against stadium theater owners, and began to assert very different interpretations of Section 4.33.3. The first such action was *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000), in which the DOJ filed an *amicus curiae* brief on July 15, 1998. Regal Cinemas Inc., Petition for a Writ of *Certiorari* ("Cert. Petition") at 7. In that brief, the DOJ stated *for the first time* that the term "lines-of-sight" as used in Section 4.33.3 required that "wheelchair seating locations . . . be provided lines of sight in the stadium seats within the range of viewing angles offered to most of the general public *in the stadium seats, adjusted for seat tilt.*" Pet. App. at 73a-84a. In other words, contrary to the advice Hoyts received over the DOJ Helpline in 1996, the DOJ took the position in July 1998 that Section 4.33.3 required movie-theater operators to locate wheelchair seating within a certain part of the "stadium" section of their theaters.[7]

By the time the DOJ first announced its position in the July 1998 *Lara* brief, however, *over 90%* of all the Hoyts stadium-style theaters were already built or under construction.

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7. After the government filed an *amicus* brief in *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000), Anderson changed his "Helpline" advice. Anderson Dep., App. at 19a.

4. The Access Board's Response to the DOJ's *Lara v. Cinemark* Interpretation of Section 4.33.3

Prompted by the DOJ's litigation position in *Lara*, in November 1999 the Access Board said it was considering modifying Section 4.33.3 to include specific requirements in the final rule consistent with the DOJ's more recent interpretation of Section 4.33.3 in the context of stadium-style movie theaters. ADAAG Proposed Rules, 64 Fed. Reg. 62,248, 62,277 (Nov. 16, 1999) (codified at 36 C.F.R. pt. 1190 & 1191). 64 Fed. Reg. at 62,278 (emphasis added). Despite the DOJ's new litigating position on the meaning of Section 4.33.3, however, the Access Board did not issue any revision to Section 4.33.3 at that time.

In April 2002, the Access Board finally proposed an extensive revision to Section 4.33.3. The April 2002 proposed revision would require that "wheelchair spaces shall be dispersed and *shall provide spectators in wheelchair spaces with a range of seating locations and viewing angles substantially equivalent to, or better than, the range of seating locations and viewing angles available to all other spectators*." Draft Final ADA and ABA Accessibility Guidelines, April 2, 2002, App. at 21a (emphasis added). The Access Board's 2002 draft regulation, however, *still* has not been enacted into law.

5. The DOJ's Continually-Changing Interpretations of Section 4.33.3 in *U.S. v. Hoyts*

In December 2000, the DOJ commenced the *U.S. v. Hoyts* action.[8] In that action, the DOJ presented various — and often conflicting — interpretations of what Section 4.33.3 means. The DOJ's interpretation of Section 4.33.3 changed *at least four times* in *U.S. v. Hoyts* from commencement of expert discovery to the present.

During expert discovery, the DOJ unveiled its first theory of the meaning of Section 4.33.3. Based on the report of the DOJ's architectural expert, Robert Luchetti, the DOJ asserted that a seat or viewing position complies with Section 4.33.3 if it complies with a four-pronged test Luchetti developed during the litigation: (i) the *"25% - 75% test"* — which a theater will "fail" if the seated eye height from the wheelchair seat locations is not within the 25% to 75% vertical range of seat rows offered; (ii) the *"vertical viewing angle test"* — which a theater will "fail" if the vertical viewing angle from the wheelchair seat locations is greater than 35 degrees; (iii) the *"viewing angle/isodeformation test"* — which a theater will "fail" if certain viewing angle distortion criteria

8. Also named in that consolidated action was National Amusements, Inc., which operates the National theater chain. At about the same time, the DOJ commenced two other direct actions against stadium-style movie-theater owners in *United States v. AMC Entertainment, Inc.*, No. CV 99-01034 FMC(SHX) (C.D. Cal.) and *United States v. Cinemark USA, Inc.*, No. 1:99 CV-705 (N.D. Ohio). The DOJ also appeared as an *amicus* at the appellate level in two additional suits brought by private plaintiffs, *Stewmon v. Regal Cinemas, Inc.*, No. 01-35554 (9th Cir.) (*i.e.*, this case) and *Susan Meineker and Sybil McPherson v. Hoyts Cinemas Corporation*, No. 1:98-CIV-1526 (DNH/DRH) (N.D.N.Y.) (*i.e.*, the other action involving Hoyts).

are not met for each wheelchair seat location; and (iv) the *"maximum distance from the screen test"* — which an auditorium will "fail" if the wheelchair seat locations do not fall within a 30-degree maximum horizontal subtended viewing angle. Plaintiff's First Supplemental Response to Defendants' First Set of Interrogatories, App. at 23a; Government's Expert Architectural Report, by Robert Luchetti Associates, Inc., dated March 15, 2002, App. at 24a-25a.

The four-pronged Luchetti test was very onerous, to put it mildly. More than 70% of all the *general, non-wheelchair seats* at Hoyts theaters failed Luchetti's test. Expert Report of John P.S. Salmen, AIA, dated April 29, 2002, App. at 26a-27a. *In certain Hoyts theaters, every seat in the theater failed to satisfy Luchetti's test. Id.*

One theater industry expert testified in *U.S. v. Hoyts* that almost every one of the thousands of stadium theaters in the United States would fail Luchetti's test. Expert Report of John Wayne Anderson, App. at 28a-29a.

The DOJ belatedly recognized that a test for compliance with Section 4.33.3 that "flunked" 70% of all *general seats* in Hoyts theaters — and *every seat in some theaters* — would never be accepted by a Court. Thus, after expert discovery closed, the DOJ announced a second theory — the "continuum theory" — in a supplementary interrogatory response. Plaintiff's Second Supplemental Response to Defendants' First Set of Interrogatories, App. at 31a-34a. This theory, while still based on Luchetti's tests, was also based on the judgment of the DOJ's trial counsel. Using its new theory, the DOJ classified Hoyts theaters into two lists: those as to which it intended to pursue a remedy at trial and those

it did not. *Id.*[9] The DOJ did not explain how it arrived at the "continuum" theory; the DOJ stated only that it had placed all Hoyts theaters on a continuum from "best to worst" based upon a "comparative analysis" of Luchetti's findings. *Id.* The DOJ did not disclose the standards used by its trial counsel in deciding where the dividing line was between passing and failing the "continuum test." *Id.*

The district court decision in *U.S. v. Hoyts* summarily rejected both DOJ's Luchetti-based standards as "confusing" and "absurdly demanding." *United Sates v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 82, 87 n.12 (D. Mass. 2003). Instead, the district court adopted its *own* test. Under the district court's "somewhere-in-the-stadium" test, wheelchair seating had to be somewhere in the stadium, meaning, according to the district court, that it had to be situated on risers of steps of no less than 12 inches high. *Id.* at 78, 90-91.[10]

The DOJ filed its cross appeal to the First Circuit in *U.S. v. Hoyts* before the *Stewmon* decision was issued. In that cross appeal, the DOJ initially embraced the district court's new theory as its own. *See* letter from Gregory Friel, to defendants' counsel, dated June 17, 2003, App. at 36a. But in its First Circuit brief filed in October 2003 — after *Stewmon* was handed down — the DOJ abandoned all its

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9. Of course application of "continuum" test to Hoys and National's theaters produced significantly different pass-fail results, but defendants could not decipher — and the DOJ never revealed — the *standards* by which the different results were obtained.

10. The district court also found, however, that because the DOJ had been "lethargic in its rulemaking capacity," its ruling would apply prospectively only. *Id.* at 92-93.

prior interpretations of Section 4.33.3 and parted ways even with the *U.S. v. Hoyts* district court.[11] It adopted a *fourth* interpretation of Section 4.33.3 for use in its First Circuit brief. The DOJ now said that Section 4.33.3's comparable-lines-of-sight provision requires that wheelchair users be provided lines of sight "within the range of viewing angles offered to most patrons in the theater." *See* Brief for the United States as Appellees/Cross-Appellant, dated October 2, 1998, in *United States v. Hoyts Cinemas Corporation*, Nos. 03-1646, 03-1787, 03-1808 (1st Cir.), App. at 37a.

It is hardly a coincidence that this latest DOJ interpretation of Section 4.33.3 was also the one that had just been adopted in August 2003 by the majority in *Stewmon*. The majority in *Stewmon* found that the interpretation of Section 4.33.3 advanced by the DOJ in that case was reasonable and entitled to deference. *Stewmon*, 339 F.3d at 1132, Pet. App. at 15a-16a. Given the DOJ's constantly shifting interpretations of this regulation, however, *Stewmon's* deference to the DOJ is plainly unwarranted.[12]

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11. The DOJ agreed with Hoyts position in its appellate brief that the district court's "somewhere-in-the-stadium" test must be vacated and remanded for application of the "correct" interpretation of Section 4.33.3.

12. The DOJ's interpretation of Section 4.33.3 has been erratic and inconsistent not just in its litigation against Hoyts, but also in the other stadium-theater actions it commenced or joined. In the *Lara* district court, the DOJ first maintained that "wheelchair seating locations . . . be provided lines of sight in the stadium seats within the range of viewing angles offered to most of the general public *in the stadium seats, adjusted for seat tilt.*" Brief of *Amicus Curiae* United States on Summary Judgment Issues at 4, 8-9, *Lara v. Cinemark USA, Inc.*, 1998 WL 1048497, Civ. No. EP-97-CA-502-H (Cont'd)

B. The DOJ's Flip-Flopping Construction Of Section 4.33.3 Demonstrates Why Deference Is Inappropriate Here

The facts here demonstrate that the government's recent approach to Section 4.33.3 has been derived from litigation strategy, not from a "fair and considered" interpretation of the regulation. Hoyts has lived through all the DOJ's interpretations of Section 4.33.3 — first the one provided to Hoyts by the DOJ's Helpline architect in 1996, later the one set forth in the *Lara amicus* brief in 1998, and later still, the rapidly-shifting interpretations adopted by the DOJ in its attempt to win the *U.S. v. Hoyts* case. The DOJ's various interpretations all conflict with each other. None of them are derived from the plain text of the regulation; indeed, if they had been, it is inconceivable that an *entire industry* would have designed and built *thousands* of theaters that do not comply with the DOJ's current views of Section 4.33.3.[13]

(Cont'd)
(W.D. Tex. Aug. 21, 1998), Pet. App. at 73a-74a. Thereafter, the DOJ argued to the Central District of California that wheelchair seating locations must provide "a line of sight that approaches an optimal viewing zone." *United States v. AMC Entm't, Inc.*, 232 F. Supp. 2d 1092, 1106 (C.D. Cal. 2002).

13. The Access Board itself acknowledged the DOJ's early litigation interpretation and chose not to codify it. *See* Cert. Petition at 8. More recently, the Access Board promulgated a *draft* regulation that appears quite similar to the DOJ's most recent construction of the regulation. That draft, however, has not been, and may never be, adopted into law. Draft Final ADA and ABA Accessibility Guidelines, April 2, 2002, App. at 20a-21a.

Accordingly, the DOJ's most recent construction of the regulation is not entitled to deference. *Bowen*, 488 U.S. at 213 (no deference where government position merely a "convenient litigation position); *Callaway*, 231 F.3d at 132-33 (no deference since Commissioner had "taken inconsistent positions before, during and after [the] litigation"); *Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1305 (D.C. Cir. 2000) (counsel's "simultaneous advocacy of several different positions" strongly suggested that Secretary never grappled with "the conundrum posed by the regulation's clear ambiguity"); *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 563 (7th Cir. 1999) (deference to an agency's amicus brief "cannot be very great" when agency "has unaccountably failed to address a fundamental issue on which [its] brief takes a radical stance."); *Malcomb v. Island Creek Coral Co.*, 15 F.3d 364, 369 (4th Cir. 1994) ("agency's record of unexplained inconsistent interpretation is particularly egregious"). *See* Cert. Petition at 21-22. *Stewmon*'s determination that the DOJ's current construction of 4.33.3 is worthy of deference must be set aside.

To grant judicial deference to the DOJ in the face of its years of waffling on the meaning of Section 4.33.3 would squarely violate the procedural safeguards for substantive rulemaking set forth in Administrative Procedures Act ("Act"). Under the APA, federal agencies like the DOJ must follow specific notice and comment rulemaking procedures before formulating substantive rules. If an agency interpretation is merely tactical, and is not subjected to notice and comment, a court has no choice but to "hold unlawful and set aside" the proposed construction as statutorily

unauthorized agency action. 5 U.S.C. § 706(2)(C)(D). *Hoctor v. United States Dep't of Agric.*, 82 F.3d 165, 170 (7th Cir. 1996).

When applying *Auer's* "fair and considered judgment" test, therefore, courts have struggled to balance the rules of agency deference against these fundamental notice and comment precepts embodied in the APA. For example, the Seventh Circuit observed:

> though we know from *Auer* . . . that, in some circumstances at least, an agency's *amicus* brief is entitled to some deference, it cannot be very great when it is the brief of an agency that has, and has exercised, rulemaking powers yet has unaccountably failed to address a fundamental issue on which the brief takes a radical stance.

Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 563 (7th Cir. 1999) (citing *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 588-89 (D.C. Cir. 1997)). *See also Akzo Nobel Salt, Inc.*, 212 F.3d at 1304-05; *Sketoe v. Exxon Co., USA*, 188 F.3d 596, 597 (5th Cir. 1999). On the most fundamental level, a regulation must give notice of what is required and an agency interpretation of that regulation must be "ascertainably certain" from the regulation's plain language to be enforceable under the fair notice doctrine. *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1330 (D.C. Cir. 1995). The decision below undermines these important principles and must be reversed.

CONCLUSION

Given the history of changing and conflicting interpretations of Section 4.33.3, both in direct communications with Hoyts before *Lara* and in litigation brought by the DOJ against Hoyts after *Lara*, the DOJ's current construction of Section 4.33.3 is neither fair nor reasonable. Where, as here, a new substantive rule masquerades as an agency interpretation, then the procedural safeguards of advance notice and opportunity for public comment are eliminated. The Ninth Circuit Decision in *Stewmon* should be reversed.

Respectfully submitted,

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